

# Roadblocks to Justice

Kat Thomas

***Survivors of military sexual assault along with advocates, plaintiff attorneys, and legislators continue to fight to remove barriers to justice.***

More than six years ago, the frequency of military sexual assault, rape, and sexual harassment cases gained widespread national attention, in part due to the release of the 2012 documentary “The Invisible War,” which revealed the pervasive and systemic problem—and cover-up—of military sexual assault.<sup>1</sup>

Since that time, legislators, survivors, advocacy groups, and trial attorneys have worked tirelessly to change how the military justice system handles sexual assault. Those efforts have been met by pushback from Congress and the U.S. Department of Defense—yet advocates have made small steps toward a system that focuses on the needs of servicemembers, who still report high instances of sexual assault, obstacles to obtaining justice, and retaliation.<sup>2</sup>

One recent change is that survivors now have greater access to post-service compensation for conditions related to military sexual trauma (MST). In 2011, in response to concerns that adjudicators were not properly handling MST-related claims, the Veterans Benefits Administration (VBA) initiated an internal review and found that numerous claims were denied, despite being submitted with the necessary documentation.<sup>3</sup> The VBA then issued a letter advising that new training policies and procedures would be implemented to reflect a “liberal approach to evidentiary

development and adjudication” of MST-related claims.<sup>4</sup> Copyright © 2018 American Association for Justice®, Formerly Association of Trial Lawyers of America (ATLA®) [www.justice.org/publications](http://www.justice.org/publications)

development and adjudication” of MST-related claims.<sup>4</sup>

The new initiatives required that adjudicators be trained on the lower, “no bright line” evidentiary standards needed to approve MST claims, and that they undergo sensitivity training.<sup>5</sup> Since the mandatory trainings, the VBA has reported higher compensation approval rates at the national level.<sup>6</sup> The VBA also approved the de novo review of claims denied before the 2011 trainings and notified servicemembers of their right to a review without needing to provide additional evidence.<sup>7</sup>

Legislative efforts to change the prosecutorial process, however, have faced greater difficulty. In 2013, Sen. Kirsten Gillibrand (D-N.Y.) introduced the “Military Justice Improvement Act” (MJIA), which sought to address the problem of allowing commanders with no legal training—and in the same chain of command as the survivor—to decide whether to prosecute the survivor’s claim.<sup>8</sup> Granting the survivor’s commanding officer this kind of power is similar to allowing a nursing home superintendent, not the district attorney, to decide whether to prosecute a staff member for claims of egregious crimes that occurred under the superintendent’s watch.

Under the MJIA, only an independent, trained prosecutor would have the authority to decide whether to pursue certain crimes, including sexual assault, rape, and sexual misconduct.<sup>9</sup> Congress blocked the MJIA in 2014.<sup>10</sup> However, Gillibrand has not only reintroduced the MJIA but consistently reports on the barriers to justice for survivors of military sexual assault.<sup>11</sup>

Rep. Jackie Speier (D-Calif.) also joined the fight by introducing

legislation that criminalizes military members' dissemination of nude images of any person without their consent.<sup>12</sup> As a result, the 2018 National Defense Authorization Act (NDAA) amended the Uniform Code of Military Justice and required a court-martial of any servicemember found guilty of wrongfully distributing sexually explicit images of any person.<sup>13</sup> The 2018 NDAA also required special victims' counsel to undergo additional training to assist male survivors and required better reporting standards for sexual assault cases and online sexual harassment—including the number of substantiated and unsubstantiated reports, a synopsis of each report, and follow-up actions taken in response.<sup>14</sup>

Advocates have brought about important changes to the way the U.S. military handles sexual assault cases. However, survivors still need greater protections—and better access to restorative justice. We can support these efforts and show our nation's defenders that we stand with them.



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#### NOTES

1. For more information about "The Invisible War," visit [www.pbs.org/independentlens/films/invisible-war](http://www.pbs.org/independentlens/films/invisible-war). The film also featured two cases that were making their way through appellate courts at the time: *Cioca v. Rumsfeld*, 720 F.3d 505 (4th Cir. 2013) and *Klay v. Panetta*, 758 F.3d 369 (D.C. Cir. 2014). Both cases, while eventually dismissed, brought congressional attention to the issue. See Lorelei Laird, *Military Lawyers Confront*

*Changes as Sexual Assault Becomes Big News*, A.B.A. J. (Sept. 2013), [www.abajournal.com/magazine/article/military\\_lawyers\\_confront\\_changes\\_as\\_sexual\\_assault\\_becomes\\_big\\_news/](http://www.abajournal.com/magazine/article/military_lawyers_confront_changes_as_sexual_assault_becomes_big_news/).

2. See generally Office of Sen. Kirsten Gillibrand, *Snapshot Review of Sexual Assault Report Files at the Four Largest Military Bases in the United States* (Sept. 2017), <https://tinyurl.com/ybwg9sgj>.

3. U.S. Gov't Accountability Office, *Military Sexual Trauma: Improvements Made, But VA Can Do More to Track and Improve the Consistency of Disability Claim Decisions* 9–12 (June 2014), <https://www.gao.gov/assets/670/663964.pdf> [hereinafter GAO Report].

4. See Letter From Thomas J. Murphy, Dir., *Training Letter 11-05: Adjudicating Posttraumatic Stress Disorder (PTSD) Claims Based on Military Sexual Trauma (MST)* (Dec. 2, 2011), <https://tinyurl.com/ya3vg2bq>.

5. See GAO Report, *supra* note 3, at 10–12.

6. U.S. Dep't of Veterans Aff., *Fact Sheet: Disability Compensation for Conditions Related to Military Sexual Trauma* 10–12 (Mar. 2016), <https://www.benefits.va.gov/BENEFITS/factsheets/serviceconnected/MST.pdf>. The GAO found that approval ratings still vary widely at the regional level. See GAO Report, *supra* note 3, at 15–19.

7. *Id.* at 12.

8. Military Justice Improvement Act, S. 1752, 113th Cong. (2013).

9. *Id.* at §2(a)(4).

10. Scott Neuman, *Senate Blocks Bill to Overhaul Military Sex Assault Prosecutions*, Nat'l Pub. Radio (Mar. 6, 2014), <https://www.npr.org/sections/thetwo-way/2014/03/06/286886468/senate-blocks-bill-to-overhaul-military-sex-assault-prosecutions>.

11. See Gillibrand, *supra* note 2. This is one of three reports from Sen. Gillibrand's office on military sexual assault since 2012.

12. Press Release, Congresswoman Jackie Speier, *Congresswoman Speier, Gloria Allred, Marines United Survivor Introduce Bill Criminalizing Servicemembers Sharing Intimate Images Without Consent* (Mar. 16, 2017), <https://speier.house.gov/media-center/press-releases/congresswoman-speier-gloria-allred-marines-united-survivor-introduce>.

13. 10 U.S.C. §917 (2012), amended by National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, §533, 131 Stat. 1283 (2017).

14. *Id.* at §§536–38.